St. John's Law Review

Volume 51
Number 2 *Volume 51, Winter 1977, Number 2*

Article 6

July 2012

Deed of Trust Held to be Property in Chapter XI Arrangement (Fidelity Mortgage Investors v. Camelia Builders, Inc. (In re Fidelity Mortgage Investors))

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BANKRUPTCY LAW

DEED OF TRUST HELD TO BE PROPERTY OF DEBTOR IN CHAPTER XI ARRANGEMENT

Fidelity Mortgage Investors v. Camelia Builders, Inc. (In re Fidelity Mortgage Investors)

Chapter XI of the Bankruptcy Act[1] provides an insolvent debtor with a means of relief less severe than liquidation.[2] Pursuant to this chapter, a debtor may voluntarily effect an arrangement[3] with his unsecured creditors[4] under the auspices of the bankruptcy court, while retaining possession and use of its property.[5] In order to administer the orderly rehabilitation of the debtor under Chapter XI, the bankruptcy court has been granted exclusive jurisdiction over the debtor's property wherever located.[6] Additionally, bankruptcy rule 11-44 provides that the filing of a Chapter XI petition automatically stays any judicial proceeding against the debtor and prohibits the commencement of any suit to enforce a lien against its property.[7]

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[1] Bankruptcy Act §§ 301-399, 11 U.S.C. §§ 701-799 (1970).

[2] Rehabilitation of the debtor is the objective of Chapter XI. *See* 1 COLLIER, BANKRUPTCY ¶ 0.01 (14th ed. 1977) [hereinafter cited as COLLIER]. Straight bankruptcy, which involves the liquidation of a debtor's estate, is dealt with in Chapters I through VII of the Bankruptcy Act. Bankruptcy Act §§ 1-72, 11 U.S.C. §§ 1-112 (1970 & Supp. V 1975).

[3] An arrangement is defined as "any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of any of his unsecured debts, upon any terms." Bankruptcy Act § 306(1), 11 U.S.C. § 706(1) (1970). For a description of the procedures used in Chapter XI, see Butler, *Proceedings Under Chapter XI of the Federal Bankruptcy Act*, 11 GA. ST. B.J. 220 (1975).

[4] The claims of secured creditors are not included in a Chapter XI arrangement. Bankruptcy Act § 306(1), 11 U.S.C. § 706(1) (1970). Thus, an arrangement pursuant to this section may not modify or affect the status of secured creditors. SEC v. United States Realty & Improvement Co., 310 U.S. 434, 452 (1940); 8 COLLIER, *supra* note 2, ¶ 2.07[3], at 77. *See* note 46 *infra*.

[5] Absent the appointment of a receiver by the court, Bankruptcy Act § 332, 11 U.S.C. § 732 (1970), the debtor is permitted to retain possession of his property. *Id.* § 342, 11 U.S.C. § 742 (1970). Moreover, the debtor-in-possession has the authority, subject to the control of the court, to operate his business and manage his property during the Chapter XI proceedings. *Id.* § 343, 11 U.S.C. § 743 (1970).

[6] *Id.* § 311, 11 U.S.C. § 711 (1970).

[7] Bankruptcy rule 11-44 became effective July 1, 1974. Bankruptcy Rules and Official Bankruptcy Forms, 415 U.S. 1003, 1033-35 (1974). It was promulgated pursuant to 28 U.S.C. § 2075 (1970), which provides that "[t]he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act. Such rules shall not abridge, enlarge, or modify any substantive right."

The importance of the Chapter XI rules cannot be overemphasized since they supersede much of Chapter XI. "All laws in conflict with such rules shall be of no further force or effect

Since this stay extends only to proceedings involving property over which the Chapter XI court has jurisdiction,[8] the courts often must determine whether a debtor's particular interest constitutes property within the meaning of the Act. If the bankruptcy court has jurisdiction, the referee has the power, pursuant to bankruptcy rule 920,[9] to punish any conduct prohibited by section 41a of the Act, which provides that a person shall not "disobey or resist any lawful order, process, or writ" in proceedings before a referee.[10]

Against this background, the Second Circuit, in *Fidelity Mortgage Investors v. Camelia Builders, Inc. (In re Fidelity Mortgage Investors)*,[11] recently resolved two significant issues affecting Chapter XI arrangements. The court first held that a debtor's deed of trust constitutes property within the meaning of the Bankruptcy Act, thereby subjecting it to the bankruptcy court's exclusive jurisdiction and making conflicting claims to the underlying property subject to the rule 11-44 stay.[12] Next, the Second Circuit found that although the referee is not expressly given the power to punish violation of a bankruptcy rule as contempt, rule 920 implicitly authorizes this sanction.[13]

Fidelity Mortgage Investors (FMI), a real estate investment trust,[14] granted a construction loan to the developer of a condominium project in Jackson, Mississippi. In return for that loan, FMI received a first deed of trust on the project and the land on which it was to be built.[15] Camelia Builders, Inc. and Farnale, Inc. were

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after such rules have taken effect." *Id. See* King, *The Proposed Chapter XI Rules and Official Forms*, 47 REF. J. 127 (1973); Treister, *The Proposed Chapter X and XI Rules*, 47 REF. J. 1 (1973).

[8] *See* Mid-Jersey Nat'l Bank v. Fidelity Mortgage Investors, 518 F.2d 640, 643 (3d Cir. 1975); Best TV Inc. v. Allen (*In re* Muntz TV Inc.), 229 F.2d 314, 316-17 (7th Cir. 1956); Northern Paper Mills v. Cary (*In re* Patten Paper Co.), 86 F.2d 761, 765 (7th Cir. 1936); 6 COLLIER, *supra* note 2, ¶ 3.32, at 657.

[9] Bankruptcy rule 920(a)(2) provides in pertinent part: "Any . . . conduct prohibited by § 41a of the Act may be punished by the referee only after hearing on notice."

[10] Bankruptcy Act § 41a, 11 U.S.C. § 69a (1970).

[11] 10 Collier Bankr. Cas. 185 (2d Cir. Sept. 3, 1976), *cert. denied*, 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977), *aff'g* [1975-1976 Transfer Binder] BANKR. L. REP. (CCH) ¶ 65,865 (S.D.N.Y. 1975), *aff'g* 5 Collier Bankr. Cas. 386 (Bankr. Ct. S.D.N.Y. 1975).

[12] 10 Collier Bankr. Cas. at 195-96.

[13] *Id.* at 193-94.

[14] A real estate investment trust is an unincorporated trust, owned by 100 or more persons whose ownership is evidenced by transferable shares. The trust obtains certain percentages of its income from investments in realty. It may not hold any property "primarily for sale to customers in the ordinary course of its trade or business." I.R.C. § 856(a)(4).

[15] 10 Collier Bankr. Cas. at 188. In a number of jurisdictions, a mortgagor conveys a deed to a third person as trustee for both the mortgagor and the secured party. This is denominated a deed of trust, and has much the same effect as a mortgage with power of sale in the creditor.

organized as a joint venture and acted as general contractor on the development. They held materialmens' and mechanics' liens on the project for supplies and labor furnished. The condominium developer ran into financial difficulties, and shortly thereafter FMI also faced ecomomic problems. In January 1975 FMI filed a Chapter XI petition in the Southern District of New York.[16]

After FMI had commenced a nonjudicial sale of the secured property, Camelia and Farnale instituted an action in federal district court in Mississippi in March 1975 to have their liens declared superior to FMI's interest.[17] Pursuant to that action FMI was allowed to complete the sale, but was forced to deposit the proceeds of the sale into court until a determination on the merits could be made.[18] FMI then moved in the New York bankruptcy court to have Camelia and Farnale held in contempt for instituting the suit without the bankruptcy court's permission.[19] Bankruptcy Judge Herzog found Camelia and Farnale in contempt.[20] Concluding that the lim-

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The title to the property remains in the mortgagor until foreclosure. The major practical difference between a mortgage and a deed of trust is that a deed of trust may be foreclosed without a court decree. 9 G. THOMPSON, REAL PROPERTY § 4660 (rev. ed. 1958). Although the beneficiary of the trust gains no title to the property, he has an inherent interest in the land since he can cause the trustee to sell it and have the proceeds applied to payment of his loan. Baker v. Connecticut Gen. Life Ins. Co., 196 Miss. 701, 18 So. 2d 438 (1944); 4A R. POWELL, REAL PROPERTY ¶ 574 (rev. ed. 1977).

[16] 10 Collier Bankr. Cas. at 188.

[17] *Id.* at 188-89. The action sought an order enjoining FMI from proceeding with its foreclosure sale, declaring Camelia's and Farnale's mechanics' lien superior to FMI's, and, if the sale were not enjoined, requiring FMI to remit the proceeds of the sale to the court to the extent of $75,964.33. *See* 5 Collier Bankr. Cas. at 388.

[18] 10 Collier Bankr. Cas. at 189.

[19] *Id.* The bankruptcy court can vacate the rule 11-44 stay upon a showing that "immediate and irreparable injury, loss, or damage will result." BANKR. R. 11-44(e).

[20] 5 Collier Bankr. Cas. at 388. Judge Herzog found that Hubbard, attorney for Farnale, knew of the rule 11-44 stay and intentionally ignored it, hoping that appellants' action could be justified by 28 U.S.C. § 959 (1970), which permits suits against debtors-in-possession arising out of transactions involved in the debtors' continuing business. This § 959 defense was not accepted by the Second Circuit. 10 Collier Bankr. Cas. at 200. The court noted that the purpose of § 959 is to enable a debtor-in-possession to continue his business after filing a Chapter XI petition. If the debtor could continue his business while obtaining immunity from suits arising out of new transactions, new business would be difficult to find. "Suppliers would be less likely to provide merchandise, banks would be less likely to extend credit and workers would be less likely to undertake employment . . . if they were foreclosed from suing the debtor . . . ." *Id.* In *Fidelity,* however, appellants' suit arose, not from transaction of new business, but from a transaction which occurred prior to the Chapter XI proceedings. This type of action, *i.e.,* one brought after the debtor's bankruptcy petition and based on a pre-bankruptcy transaction, is specifically what the rule 11-44 stay was designed to prevent. Recognizing that the distinction between a suit arising from transaction of new business and a suit based on old business may be unclear in certain instances, the court nevertheless found no such ambiguity in *Fidelity.* The suit by Camelia and Farnale "arose from FMI's bank-

ited punishment he could impose was insufficient, he certified the matter to the district court.[21] There, Judge Owen ruled that Judge Herzog's findings were not clearly erroneous, and upheld the contempt citation.[22]

A divided Second Circuit panel upheld the district court's decision.[23] The author of the majority opinion, Judge Smith, quickly concluded that FMI's deed of trust was property within the meaning of the Act. In so holding, the court relied solely on the Supreme Court's treatment of the bankruptcy property concept in *Segal v. Rochelle.*[24] The *Fidelity* court stated that in bankruptcy, "the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed."[25] Applying this liberal interpretation, the majority held that the bankruptcy court did have jurisdiction over FMI's deed.[26]

Turning next to the appellants' contention that the contempt citation was unauthorized, Judge Smith concluded that rule 920 must be interpreted to permit contempt proceedings for violation of the bankruptcy rules. Noting that the rules are to be construed so as to aid in the expeditious processing of bankruptcy petitions, the Second Circuit reasoned that affording violators of a rule immunity from punishment by the referee through his contempt powers would hamper this underlying policy.[27] Moreover, according to the court, rule 11-44 has the effect of an order and was adopted to "expedite automatically the stay that would otherwise be obtained by an order."[28] Thus, the majority concluded that a contrary holding would be "exalting form over substance."[29] As further support for

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ruptcy, rather than FMI's continuing conduct of business . . . ." *Id.* at 200-01. *Cf.* Austrian v. Williams, 216 F.2d 278 (2d Cir. 1954), *cert. denied,* 348 U.S. 953 (1955)(attempted collection and liquidation of debtor's assets by trustee is not continuation of debtor's business).

[21] Bankruptcy rule 920(a)(3) provides that a bankruptcy judge is limited to imposing a fine for contempt of not more than $250. If he believes a greater sanction is warranted, he may certify the facts to a district court judge. The district court may punish by fine or imprisonment pursuant to 18 U.S.C. § 401(3) (1970), which vests the court with discretion as to the terms of penalty. Frank v. United States, 395 U.S. 147 (1969); Green v. United States, 356 U.S. 165 (1958).

[22] [1975-1976 Transfer Binder] BANKR. L. REP. (CCH) ¶ 65,865, at 75,590-91.

[23] 10 Collier Bankr. Cas. at 189. Judge Smith wrote the majority opinion for himself and Judge Mansfield. Judge Van Graafeiland authored a dissenting opinion.

[24] 382 U.S. 375 (1966).

[25] 10 Collier Bankr. Cas. at 196, *quoting* Segal v. Rochelle, 382 U.S. 375, 379 (1966).

[26] 10 Collier Bankr. Cas. at 196.

[27] *Id.* at 194.

[28] *Id. See* note 73 and accompanying text *infra.*

[29] 10 Collier Bankr. Cas. at 194.

the court's holding, Judge Smith cited cases holding that a willful, knowing violation of rules 401[30] and 601,[31] which provide automatic stays similar to that of rule 11-44, constitutes contempt of court punishable by the bankruptcy judge.[32]

In a strongly worded dissent, Judge Van Graafeiland declared that FMI had no possessory property interest under the Act and, therefore, the bankruptcy court's essentially in rem jurisdiction was absent.[33] Interpreting the applicable Mississippi law, he viewed the deed of trust as a conveyance of an interest limited to the beneficiary's right to "cause the trustee to sell the land and apply the proceeds to the payment of the secured debt."[34] Thus, the dissent concluded that FMI had no "estate in the land."[35]

Judge Van Graafeiland also dissented from the majority's holding on the contempt issue. Expressing grave concern over the expansion of contempt powers beyond the literal wording of the statute conferring those powers, he contended that "statutory contempt proceedings should be reviewed in a highly technical manner."[36] Moreover, the disssent found that the omission of the term rules from section 41a was intentional since this section was patterned after section 401 of Title 18, which expressly includes rules.[37] Shar-

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[30] Bankruptcy rule 401 provides that the filing of a petition for bankruptcy "shall operate as a stay of the commencement or continuation of any action against the bankrupt, or the enforcement of any judgment against him, if the action or judgment is founded on an unsecured provable debt . . . ."

[31] Bankruptcy rule 601 provides that "[t]he filing of a petition shall operate as a stay of any act or the commencement or continuation of any court proceeding to enforce (1) a lien against property in the custody of the bankruptcy court . . . ."

[32] 10 Collier Bankr. Cas. at 194, *citing* United States v. Moore (*In re* Tallyn), [1975-1976 Transfer Binder] BANKR. L. REP. (CCH) ¶ 65,617 (E.D. Va. 1975); *In re* Young, 1 Collier Bankr. Cas. 145 (M.D. Fla. 1974).

[33] 10 Collier Bankr. Cas. at 205-06 (Van Graafeiland, J., dissenting). Judge Van Graafeiland noted that a given project might be subject to numerous mechanics' liens and mortgages. He interpreted the majority holding as a finding that the mortgaged premises are the property of the mortgagee and feared that this could result in troublesome jurisdictional disputes if various lienors, in succession, filed for bankruptcy. *Id.* at 206 n. 7. *See* note 63 *infra.*

[34] 10 Collier Bankr. Cas. at 205 (Van Graafeiland, J., dissenting). The Mississippi Supreme Court decided in Baker v. Connecticut Gen'l Life Ins. Co., 196 Miss. 701, 18 So. 2d 438 (1944), that the holder of a deed of trust has no title in the land described therein.

[35] 10 Collier Bankr. Cas. at 206 (Van Graafeiland, J., dissenting).

[36] *Id.* at 206, *citing* Denver-Greeley Valley Water Users' Ass'n v. McNeil, 131 F.2d 67, 70 (10th Cir. 1942); Berry v. Midtown Serv. Corp., 104 F.2d 107, 109 (2d Cir.), *appeal dismissed per stipulation,* 308 U.S. 629 (1939); *In re* Probst, 205 F. 512, 513 (2d Cir. 1913). In these cases the courts refused to punish those who had allegedly violated court orders which were directed to other parties. Since no order was directed to any of the defendants, the courts found no contempt. None of these courts was faced with the technical significance of the use of the terms writs, orders, process, or rules.

[37] 18 U.S.C. § 401 (1970) provides in pertinent part: "A court of the United States shall

ing Justice Douglas' opinion that the exercise of the contempt power "is a delicate one and care is needed to avoid arbitrary and oppressive conclusions,"[38] Judge Van Graafeiland concluded that construing rule 920 to permit the punishment of someone remotely affected by the bankruptcy court's jurisdiction for violation of "one of the many, little known rules of bankruptcy procedure" was extremely objectionable.[39]

The Supreme Court's decision in *Segal* does not in itself mandate the *Fidelity* result.[40] *Segal* involved an inquiry into the nature of the property interests which revert to the trustee in a straight bankruptcy proceeding. The Supreme Court held that a loss carryback tax refund was property within the meaning of section 70a of the Act,[41] thereby vesting title in the trustee. In making this determination, the Court observed that it is impossible to define property categorically for bankruptcy purposes and that the term encompasses interests which are novel and contingent as well as those where enjoyment must be postponed.[42] The Court reasoned that since in straight bankruptcy every valuable asset possessed by the debtor at the time the petition is filed must be secured for the protection of his creditors, the scope of the term property should be broadly construed.[43]

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have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as — (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

[38] 10 Collier Bankr. Cas. at 208 (Van Graafeiland, J., dissenting), *quoting* 411 U.S. 989, 993 (1973) (Douglas, J., dissenting from promulgation of the bankruptcy rules, *quoting* Cooke v. United States, 267 U.S. 517, 539 (1925)(Taft, C.J.)).

[39] 10 Collier Bankr. Cas. at 208 (Van Graafeiland, J., dissenting).

[40] *See* text accompanying note 44 *infra*.

[41] Bankruptcy Act § 70a, 11 U.S.C. § 110a (1970) sets forth the property interests which vest in the trustee upon the filing of a straight bankruptcy petition. The guiding criterion under this section is susceptibility to transfer or levy. *See* Chicago Bd. of Trade v. Johnson, 264 U.S. 1 (1924); Young v. Handwork, 179 F.2d 70 (7th Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); C. NADLER, THE LAW OF BANKRUPTCY § 272 (2d ed. S. Nadler & M. Nadler 1972). It is evident that the trustee will be vested with any rights the bankrupt possesses as lienor or mortgagee pursuant to this section. *See, e.g.*, 4A COLLIER, *supra* note 2, ¶ 70.16[6], at 156.1.

[42] 382 U.S. at 379.

[43] *Id. Accord*, Kokoszka v. Belford, 417 U.S. 642, 645-46 (1974). For examples of situations in which the courts have employed this broad definition to protect creditors, see Kolb v. Berlin, 356 F.2d 269 (5th Cir. 1966) (money due for earned annual leave); Ryan v. Chatz (*In re* A. Roth Co.), 118 F.2d 156 (7th Cir. 1941) (mortgagor's equity of redemption); *In re* Zeitzer Food Corp., 9 Collier Bankr. Cas. 614 (Bankr. Ct. E.D.N.Y. July 26, 1976) (license to purchase farm products for resale to institutional buyers); Georgia Power Co. v. Securities Invest. Prop., Inc. (*In re* Security Invest. Prop. Inc.), 7 Collier Bankr. Cas. 151 (N.D. Ga. 1975) (right to electrical service).

Although the *Segal* Court's approach to the definitional problem may be applicable to *Fidelity,* certain distinctions between the two cases must be noted. The interest involved in *Segal* was clearly either the bankrupt's or the trustee's. No third parties made any claim to the refund. In contrast, the *Fidelity* court had to determine whether an interest in property in which third parties asserted rights that had arisen prior to the Chapter XI petition came within the bankruptcy court's jurisdiction. The *Segal* dispute, moreover, arose in the course of a straight bankruptcy proceeding, whereas *Fidelity* involved a Chapter XI arrangement. It is suggested that although *Segal* does support the Second Circuit's decision by analogy, it is not fully apposite, and thus, instead of relying solely on *Segal,* the *Fidelity* court should have examined the property concept in a Chapter XI context. This would necessitate an examination of the purposes of Chapter XI proceedings, an approach clearly in accord with the Supreme Court's rationale in *Segal.*[44]

Chapter XI proceedings seek to preserve the debtor as a functioning entity.[45] To achieve this result, it is often necessary to compel alteration or adjustment of existing legal rights in the debtor's business and property.[46] In order to effectively administer these pro-

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A somewhat different approach was taken by the Supreme Court in Lines v. Frederick, 400 U.S. 18 (1970) (per curiam). In determining that accrued unpaid vacation pay was not property within Bankruptcy Act § 70a(5), 11 U.S.C. § 110a(5) (1970), the Court wrote: "The most important consideration limiting the breadth of the definition of 'property' lies in the basic purpose of the Bankruptcy Act to give the debtor a 'new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' " 400 U.S. at 19, *quoting* Local Loan Co. v. Hunt, 292 U.S. 234, 244-45 (1934). Thus, the concern for granting the bankrupt a fresh start, rather than the policy of securing everything of value for creditors, was predominant in *Lines. See* 49 N.C.L. REV. 738, 740 (1971).

In Kokoszka v. Belford, 417 U.S. 642 (1974), the Court again had an opportunity to discuss the purposes of the Bankruptcy Act. The *Kokoszka* Court stated that the Act has a dual objective—liquidating the bankrupt's estate to satisfy creditors, and providing the bankrupt with a fresh start. The Court directed that in determining the nature of a property interest, it is necessary to evaluate the asset in light of these principles. *Id.* at 645-46.

[44] *See* 382 U.S. at 379.

[45] The underlying theory of rehabilitation proceedings is that the going concern value of the business will exceed its liquidation value. R.I.D.C. Indus. Dev. Fund v. Snyder, 539 F.2d 487, 493 (5th Cir. 1976), *cert. denied,* 45 U.S.L.W. 3571 (U.S. Feb. 22, 1977).

[46] Chapter XI is limited to the adjustment of unsecured debts. SEC v. American Trailer Rentals Co., 379 U.S. 594, 605 (1965). Despite this general principle, it is fallacious to assume that the secured creditor is not affected by the Chapter XI proceedings. Seidman, *The Plight of the Secured Creditors in Chapter XI,* 80 COM. L.J. 343 (1975). *See also* Yacos, *Secured Creditors and Chapter XI of the Bankruptcy Act,* 44 REF. J. 29 (1970). The secured creditor's cause of action is subject to the control provided by the bankruptcy court by its use of the rule 11-44 stay. A delay in the enforcement of a security interest may result in decline in its value due to depreciation of the asset upon which the lien is held. *See generally* Murphy,

ceedings while equitably settling conflicting claims, exclusive authority is vested in one tribunal—the bankruptcy court. The automatic stay that becomes effective upon filing of the petition for an arrangement facilitates rehabilitation of the debtor by preventing creditors in various jurisdictions from initiating proceedings which would divest the debtor of property crucial to the success of the plan.[47] It is contemplated that the court will assume exclusive jurisdiction over all controversies which directly affect the reorganization effort.[48] In order to effectuate this result, courts presented with a challenge to the authority of the bankruptcy court have generally adopted a broad construction of the term property under Chapter XI.[49]

This approach is illustrated by *Florida Institute of Technology v. Carpenter (In re Westec Corp.),*[50] a Chapter X proceeding,[51]

Restraint and Reimbursement: The Secured Creditor in Reorganization and Arrangement Proceedings, 30 BUS. LAW. 15, 43 (1974).

That the secured creditor, however, has a constitutional right to receive the value of his collateral was recognized by the Supreme Court in Wright v. Union Cent. Life Ins. Co., 311 U.S. 273 (1940). Justice Douglas stated therein that "[s]afeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. There is no constitutional claim of the creditor to more than that." *Id.* at 278 (citations omitted). In order to protect these rights of secured creditors, rule 11-44(e) authorizes a bankruptcy judge to lift the stay without notice to the debtor if such action is necessary to prevent irreparable injury to the creditor. *See* note 70 *infra.*

[47] Assets such as inventory, accounts receivable, and income producing property may be subject to liens of numerous creditors. *See* Murphy, *Restraint and Reimbursement: The Secured Creditor in Reorganization and Arrangement Proceedings,* 30 BUS. LAW. 15, 16, 45 (1974). As these assets are necessary for the debtor to continue normal business operations, a stay is needed to prevent interference with this property by secured creditors during the Chapter XI proceedings. *See, e.g.,* Teledyne Indus. Inc. v. Eon Corp., 373 F. Supp. 191, 203 (S.D.N.Y. 1974); *In re* Krull, 21 F. Supp. 377, 378 (M.D. Pa. 1937); 8 COLLIER, *supra* note 2, ¶ 3.20, at 237.

[48] *See In re* International Power Sec. Corp., 170 F.2d 399 (3d Cir. 1948), wherein the court observed that the bankruptcy power includes *"the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto." Id.* at 402 (emphasis in original). *See also* First Nat'l Bank v. Lake, 199 F.2d 524, 528 (4th Cir. 1952), *cert. denied,* 344 U.S. 914 (1953); Lake Shore Fin. Co. v. Weir (*In re* Cuyahoga Fin. Co.), 136 F.2d 18, 21 (6th Cir. 1943); *In re* Burton Coal Co., 126 F.2d 447, 448 (7th Cir. 1942).

[49] *See In re* International Power Sec. Corp., 170 F.2d 399, 402 (3d Cir. 1948) wherein the Third Circuit stated "[t]he tendency of judicial interpretation of the Act has been in the direction of progressive liberalization in respect of the operation of the bankruptcy power so as to meet the challenge of present day economic and business conditions."

[50] 460 F.2d 1139 (5th Cir. 1972).

[51] A reorganization brought pursuant to Chapter X of Bankruptcy Act §§ 101-276, 11 U.S.C. §§ 501-676 (1970) is quite similar to a Chapter XI arrangement, with many of the differences being merely procedural. *See* 9 H. REMINGTON, BANKRUPTCY § 3564 (1955 & Supp. 1976). The main distinction between the two is that a Chapter X reorganization restructures the entire debt base of the debtor, as against both secured and unsecured creditors. Bankruptcy Act § 216(1), 11 U.S.C. § 516(1) (1970). Thus, unlike a Chapter XI arrangement, *see*

wherein the Fifth Circuit reached a conclusion similar to that of the Second Circuit in *Fidelity*. The *Westec* court held that a mortgage lien, although subordinate to a statutory tax lien,[52] was a property interest sufficient to confer exclusive jurisdiction in the bankruptcy court.[53] To reach this conclusion, the court reasoned that property can constitute something other than fee ownership.[54]

The Ninth Circuit interpreted the property concept in the same manner in *Texas Co. v. Hauptman*.[55] There, the debtor in a section 77B proceeding,[56] the precursor of Chapters X and XI,[57] held a first mortgage on a ship. The holder of a second mortgage filed a libel and had the ship seized, despite a stay granted by the bankruptcy court[58] against suits against the debtor or his property. The Ninth

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note 46 *supra*, it is not limited to the relationship between the debtor and his unsecured creditors. The SEC can also take on a more significant role in Chapter X than in Chapter XI. Bankruptcy Act §§ 172, 173, 208, 328, 11 U.S.C. §§ 572, 573, 708, 728 (1970). For judicial examination of the relationship between Chapters X and XI, see SEC v. American Trailer Rentals Co., 379 U.S. 594 (1965); SEC v. United States Realty & Improvement Co., 310 U.S. 434 (1940); *In re* Texas Consumer Fin. Corp., 480 F.2d 1261 (5th Cir. 1973). Nonetheless, the main objective of both reorganization and arrangement is rehabilitation of the debtor. Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972); Nicholas v. United States, 384 U.S. 678 (1966); *In re* Metropolitan Realty Corp., 433 F.2d 676 (5th Cir. 1970), *cert. denied*, 401 U.S. 1008 (1971); G.F. Wertime, Inc. v. Turchick, 358 F.2d 802 (2d Cir. 1966) (Chapter X); World Scope Publishers, Inc. v. United States, 348 F.2d 640 (2d Cir. 1965). To effectuate this purpose, both chapters provide for stay of suits against the debtor or his property. Bankruptcy Act §§ 113, 116(4), 148, 314, 11 U.S.C. §§ 513, 516(4), 548, 714 (1970). Since the basic purposes of both are the same, and the underlying statutes identical, the rules applying to Chapters X and XI must be interpreted similarly, subject to the particular situation involved, *i.e.*, the nature of the rights which will be affected. PRACTISING LAW INSTITUTE, BANKRUPTCY: PRACTICE AND PROCEDURE 74-75, 97-102 (1974).

[52] *See* note 67 and accompanying text *infra*.

[53] 460 F.2d at 1144. In *Westec*, the Florida authorities held a statutory tax lien on property on which the debtor held first and second mortgages. Although the taxing authority was aware of the pending Chapter X proceeding, it conducted a tax sale at which the property was sold for $20.00. *Id.* at 1143. The Fifth Circuit was faced with the question whether the bankruptcy court had jurisdiction over the debtors first and second mortgages so as to allow it to determine the debtor's right with respect to the underlying property. Holding that the mortgage interest was a property interest subject to the jurisdiction of the bankruptcy court, the Fifth Circuit concluded that because the taxing authority was aware of the pending Chapter X proceedings, they were required to seek a lifting of the restraining order before proceeding with the sale. Since this was not done, the tax deed issued to the buyer at the sale was ineffective as against the debtor and the debtor's mortgage interest remained intact. *Id.*

[54] *Id.*

[55] 91 F.2d 449 (9th Cir. 1937).

[56] Act of June 7, 1934, ch. 424, 48 Stat. 912.

[57] For a discussion of the influence of § 77B on Chapters X and XI, see 9 H. REMINGTON, BANKRUPTCY § 3564 (1955 & Supp. 1976); 11 *id.* § 4345. *See also In re* Commonwealth Bond Corp., 77 F.2d 308 (2d Cir. 1935).

[58] 91 F.2d at 450.

Circuit ruled that the libel proceeding was not a suit against the debtor since it was an action in rem. Nor, according to the *Texas Co.* court, was it a suit to enforce a lien on the *debtor's* property, *i.e.*, the mortgage.[59] The court went on to say, however, that because property encompasses both the res and rights therein, including obligations, rights, and other intangibles, the debtor's mortgage interest was property within the court's jurisdiction. Thus, any action interfering with the debtor's lien was prohibited.[60] The ship could be seized and sold, but such sale would be subject to the debtor's lien.[61]

Texas Co. seems to provide a solid precedent for the decision in *Fidelity*. Had Camelia and Farnale been successful in their action, their liens would have been satisfied out of the proceeds of FMI's nonjudicial sale, thereby reducing, or possibly eliminating funds otherwise applicable to satisfaction of FMI's deed of trust. The result would have been a substantial diminution of the value of FMI's asset, an asset essential to the success of the Chapter XI arrangement. Instead of being merely a normal foreclosure proceeding, where the subsequent sale is subject to a superior, preexisting lien, such a suit would destroy the value of an asset of a debtor in bankruptcy and thus falls squarely within the ambit of rule 11-44.[62] *Westec* and *Texas Co.* make it clear that the concept of property is not dependent upon legal ownership. A deed of trust constitutes a real economic interest in the underlying property and, as such, plays a major role in any arrangement plan. Viewed in the perspective of *Texas Co.*, the debtor's mortgage interest is property. As such, it must fall within the exclusive jurisdiction of the bankruptcy court, and therefore is protected by the rule 11-44 stay.[63]

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[59] *Id.* at 450-51.

[60] *Id.* at 451-52.

[61] *Id.* at 452.

[62] *See* note 47 and accompanying text *supra*.

[63] Judge Van Graafeiland interpreted the majority's decision as establishing that the bankruptcy court had jurisdiction over the condominium project itself. This view overlooks an important disclaimer in the majority opinion. The *Fidelity* court clearly indicated that it was not ruling on the validity of appellants' substantive claims as to the priority of the liens: "It may be true, as Camelia and Farnale assert, that, by virtue of their allegedly superior claim under Mississippi law, they are entitled to protection against the consequences of FMI's attempted foreclosure on the condominium project." 10 Collier Bankr. Cas. at 201. The court was not ruling that jurisdiction over the ultimate claim of Camelia and Farnale was situated in the New York court. Rather, the majority considered the controlling question to be "whether Camelia and Farnale should have secured permission from the New York bankruptcy court before proceeding with their action in Mississippi." *Id.* at 202. This distinction obviates Judge Van Graafeiland's concern over a "jurisdictional maze," *id.* at 206 n.7 (Van

In his dissenting opinion, Judge Van Graafeiland cited several cases which he interpreted as contrary to the majority's definition of property.[64] In each of these cases, however, the debtor's interest was manifestly inferior to the interest of others.[65] In each case, the holder of a *primary* lien moved to foreclose. While this had the direct effect of cutting off the debtor's interest, the debtor had no interest in the property at all until the primary lienholder was satisfied.[66] The suits were brought, not as a direct attack upon the interest of the bankrupt, but to enforce the creditor's patently superior rights. Although the success of the foreclosure proceedings acted to cut off the bankrupt's interest, this effect was merely incidental to the intent and purpose of the proceedings, and thus, the bankruptcy court lacked the jurisdiction necessary to issue an injunction.[67] The

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Graafeiland, J., dissenting); *see* note 33 *supra,* since the bankruptcy court could readily grant permission for all secured creditors in a given project to file their claims in an appropriate manner. *See* 8 COLLIER, *supra* note 2, ¶ 3.22.

[64] 10 Collier Bankr. Cas. at 205 (Van Graafeiland, J., dissenting), *citing* First Fed. Sav. & Loan Ass'n v. Holiday Lodge, Inc. (*In re* Holiday Lodge, Inc.), 300 F.2d 516, 519 (7th Cir.), *cert. denied,* 371 U.S. 824 (1962); Ryan v. Chatz (*In re* A. Roth Co.), 125 F.2d 396, 398 (7th Cir. 1942); Brunn v. Wichser, 75 F.2d 25, 28 (3d Cir. 1934).

[65] *See* First Fed. Sav. & Loan Ass'n v. Holiday Lodge, Inc. (*In re* Holiday Lodge Inc.), 300 F.2d 516, 519 (7th Cir.), *cert. denied,* 371 U.S. 824 (1962)(debtor's lease contractually subordinate to any mortgage); Ryan v. Chatz (*In re* A. Roth Co.), 125 F.2d 396, 398 (7th Cir. 1942) (debtor's interest limited to a second mortgage); Brunn v. Wichser, 75 F.2d 25, 28 (3d Cir. 1934) (debtor's interest limited to a second mortgage). Judge Van Graafeiland also interpreted Amadori Constr. Co. v. Hoffenberg (*In re* Stanndco Devs., Inc.), 534 F.2d 1050 (2d Cir. 1976) as authority for his conclusion that the bankruptcy court in *Fidelty* lacked jurisdiction to enjoin appellants' suit. 10 Collier Bankr. Cas. at 208 (Van Graafeiland, J., dissenting). The *Stanndco* decision, however, appears distinguishable. There, plaintiff moved to vacate a Chapter X stay, so it could proceed to judgment on a surety bond. The bond was financed with a letter of credit issued by Stanndco which was secured by a mortgage on Stanndco's property. The court ruled that the stay should be modified, since a judgment would not result in a foreclosure on Stanndco's property, but rather in collection on the bond. The court granted plaintiff leave to continue its suit against the surety, but not against Stanndco. 534 F.2d at 1053-54. It should be noted that plaintiff in *Stanndco* did move to have the stay lifted, and the court implicitly accepted the notion that this was a necessity. *Id.* at 1052.

[66] *See, e.g.,* 3 R. POWELL, REAL PROPERTY ¶ 453 (rev. ed. 1977).

[67] As noted by the court in First Fed. Sav. & Loan Ass'n v. Holiday Lodge, Inc. (*In re* Holiday Lodge, Inc.), 300 F.2d 516 (7th Cir.), *cert. denied,* 371 U.S. 824 (1962) the bankruptcy court has "no jurisdiction to restrain a state court proceeding to enforce [a] . . . lien on . . . property *to the extent that it [is] superior to any interest belonging to the debtor in that property.*" 300 F.2d at 519 (emphasis added). The Fifth Circuit, in Florida Inst. of Tech. v. Carpenter (*In re* Westec Corp.), 460 F.2d 1139 (5th Cir. 1972), indicated that the general principle that inferior security interests are outside the bankruptcy court's jurisdiction should not be applied blindly. There, the debtor held both a first and second mortgage on land subject to a statutory tax lien for nonpayment of $18.84 in drainage taxes. A Florida statute, FLA. STAT. ANN. § 197.011 (West 1971) (amended 1973) made this lien superior to all others. In ruling that a foreclosure proceeding under the tax lien did not eliminate the debtor's

action brought by Camelia and Farnale, in contrast, constituted a direct attack upon the interest of FMI.[68] Hence, it seems to be directly within the purview of bankruptcy rule 11-44.

While a persuasive argument can be made that a bankruptcy court is not an appropriate forum to determine the substantive law issue of lien superiority,[69] this does not affect the viability of the stay. Rule 11-44 contains a simple and speedy mechanism for removal of the automatic stay.[70] The stay simply ensures that the bankruptcy referee will have notice of all claims against the debtor and control over the timing of any suits based on those claims. Thus, the substantive issue can properly be determined in a forum other than the bankruptcy court, but only after that court's permission has been obtained.

Having determined that the bankruptcy court did have jurisdiction, the Second Circuit proceeded to consider whether violation of a bankruptcy rule could properly be punished by the referee in a contempt proceeding. The stay established by bankruptcy rule 11-44 has the effect of a court order. Prior to promulgation of this rule,

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interests, the Fifth Circuit stated that in order to facilitate the rehabilitation of the debtor, the "courts should favor the reorganization trustee's rights vis-a-vis the local taxing statutes . . . ." 460 F.2d at 1143. The bankruptcy court is a court of equity, 1 COLLIER, *supra* note 2, ¶ 2.09, and will therefore not follow technical rules of law which would work contrary to the purposes of the Bankruptcy Act. The *Westec* court noted a district court decision holding that an inferior mortgage is not subject to the jurisdiction of a bankruptcy court, *In re* Copper Canyon Mining Co., 156 F. Supp. 535 (D. Del. 1957), but reasoned that the primary consideration behind that decision was the "insignificance" of the debtor's interest. 460 F.2d at 1143. The *Westec* opinion indicates that where the primary lien is the insignificant interest, and is superior only because of the operation of local taxing statutes, the purposes of the Bankruptcy Act require utilization of a broader concept of property so as to confer exclusive jurisdiction in the bankruptcy court.

[68] In *Fidelity*, the intent of appellants' suit was anything but incidental. *See* note 17 and accompanying text *supra*.

[69] It has often been stated that the nature of the title of the bankrupt to his property is to be determined by state law. *See* Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940); Amoco Pipeline Co. v. Admiral Crude Oil Corp., 490 F.2d 114 (10th Cir. 1974); 1 COLLIER, *supra* note 2, ¶ 2.07, at 162-66; C. NADLER, THE LAW OF BANKRUPTCY § 272 (2d ed. S. Nadler & M. Nadler 1972); 1 H. REMINGTON, BANKRUPTCY §§ 34, 38 (1955 & Supp. 1976); 5 *id.* § 2318. Although the bankruptcy court may determine the applicable state law, it is usually more prudent to remit the question to the state courts. Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940).

[70] Bankruptcy rule 11-44(d) provides that "[u]pon the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall . . . set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character." Rule 11-44(e) provides for ex parte relief where necessary to prevent irreparable injury to the plaintiff, such as where the statute of limitations on a claim is about to expire. The type of action commenced by appellants in the Mississippi district court is one of the situations in which a lifting of the bankruptcy rule 11-44 stay is entirely appropriate. *See* 8 COLLIER, *supra* note 2, ¶ 3.22, at 261.

a debtor was not automatically granted a stay, but rather, had to apply for a court order.[71] Rule 11-44 was designed to expedite the stay, increase the efficiency of Chapter XI proceedings, and grant the debtor immediate protection.[72] Instead of each referee routinely issuing a stay as his first act after the petition is filed, as normally occurred prior to rule 11-44,[73] the stay is now automatically imposed. To insist that the bankruptcy court actually order that rule 11-44 be observed before it can punish a violation of the rule, would deprive the rule of all meaning.[74] It is well established that "the power to punish for contempt is inherent in all courts . . . ."[75] The contempt power is deemed essential to the preservation of order in judicial proceedings and the administration of justice.[76] As the *Fidelity* majority reasoned, a holding that section 41a and bankruptcy rule 920 permit only institution of a contempt action for violation of an order, writ, or process would be "overly-formalistic" and "would . . . deprive the courts of the authority necessary to

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[71] Section 314 of the Bankruptcy Act, 11 U.S.C. § 714 (1970), was the basic restraint provision of Chapter XI prior to the adoption of rule 11-44. It provides that "[t]he court may . . . upon notice and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon the property of a debtor."

[72] 8 COLLIER, *supra* note 2, ¶ 3.20[3], at 235.

[73] As was stated by a member of the rules committee: "The basic difference very simply is that instead of the bankruptcy judge again routinely, in a pro forma fashion, signing an order which stays everything, it is the rule itself which does that." King, *The Proposed Chapter XI Rules and Official Forms*, 47 REF. J. 127, 132 (1973).

[74] Use of the contempt power to punish violation of rule 11-44 could create a problem in situations where the defendant had no notice of the stay. *See* note 78 *infra;* King, *The Proposed Chapter XI Rules and Official Forms*, 47 REF. J. 127, 132 (1973); *cf.* Bank of Marin v. England, 385 U.S. 99 (1966)(bank not liable to trustee for payment of checks drawn prior to bankruptcy where bank acted without knowledge or notice). *But see* 14 COLLIER, *supra* note 2, ¶ 11-44.02[4]. In *Fidelity,* however, no such problem existed for the defendants had actual knowledge of the stay. Bankruptcy Judge Herzog concluded there was "no doubt that the respondents were fully aware of the pendency of the Chapter XI case in this court." 5 Collier Bankr. Cas. at 389. He also found that Hubbard, the attorney for Farnale, "decided to 'try to hedge [his] bet' and take a chance on violating Rule 11-44." *Id.* In light of this intentional disregard for a known rule, it is difficult to share Judge Van Graafeiland's view that an injustice was being done.

[75] Michaelson v. United States *ex rel.* Chicago, St. Paul M. & O. Ry., 266 U.S. 42, 65 (1924). In Boyd v. Glucklich, 116 F. 131, 135 (8th Cir. 1902), it was recognized that bankruptcy courts are inherently vested with the power to punish for contempt. *See generally* Notes of Advisory Comm. on Bankruptcy Rules, *reprinted in* 11 U.S.C. app., at 440-515 (Supp. V 1975).

[76] A contempt proceeding can be either civil or criminal in nature. If its purpose is coercive or remedial, *i.e.,* to compel obedience to a court order or to procure substitute relief for an aggrieved party, it is a civil proceeding. If used to vindicate the authority of the court, its purpose is punitive and is criminal in nature. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911). *See* United States v. UMW, 330 U.S. 258, 302 (1947).

ensure that the rules are obeyed."[77]

While the contempt power may well be a "delicate one,"[78] the majority's holding appears consistent with the underlying purpose of rule 920. The drafters of the rule considered section 41a of the Bankruptcy Act to be a substantial paraphrase of section 401 of Title 18,[79] which expressly authorizes punishment for violation of a rule.[80] Moreover, the chronology of events does not support the dissent's position that the omission of "rules" from section 41a is indicative of a legislative intent not to afford bankruptcy courts the power to treat disregard for a rule as contempt.[81] Section 41a was enacted seventy-five years prior to the adoption of the modern bankruptcy rules.[82] Although the Supreme Court in 1898 created bankruptcy rules labelled General Orders, those rules merely established the procedures necessary to get into bankruptcy court and directed that the bankruptcy courts issue orders upon the occurrence of specified events.[83] Since the only effect of a person's violation of these General Orders was to prevent him from gaining the rights of a debtor under the Bankruptcy Act, there was no need to punish a violation as contempt and no reason for the legislature to include "rules" within section 41a.[84]

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[77] 10 Collier Bankr. Cas. at 193-94.

[78] *Id.* at 208 (Van Graafeiland, J., dissenting). Bankruptcy rule 920 grants a bankruptcy judge the authority to cite for contempt. He may do so summarily if the misbehavior occurred in his presence; if committed outside his presence, he may do so only after notice and a hearing. The power of a judge to summarily punish for contempt has long been the subject of criticism. *See, e.g.*, Green v. United States, 356 U.S. 165, 193 (1958) (Black, J., dissenting); Nelles, *Summary Power to Punish for Contempt*, 31 COLUM. L. REV. 956 (1931). *But see Ex parte* Terry, 128 U.S. 289, 313 (1888). Concern has centered upon ensuring that a given defendant is afforded due process of law. *See* Sedler, *The Summary Contempt Power and the Constitution: The View From Without and Within*, 51 N.Y.U.L. REV. 34 (1976). Contempt for violation of a bankruptcy court order, however, does not present these constitutional problems. Pursuant to rule 920(b), a defendant who violates a court order can be punished only upon hearing and notice.

[79] 18 U.S.C. § 401 (1970), *quoted in* note 37 *supra*.

[80] *See* Notes of Advisory Comm. on Bankruptcy Rules, *reprinted in* 11 U.S.C. app., at 512-13 (Supp. V. 1975).

[81] *See* 10 Collier Bankr. Cas. at 208 (Van Graafeiland, J., dissenting).

[82] Section 41a of the Bankruptcy Act, 11 U.S.C. § 69a (1970), was enacted in 1898. Bankruptcy Act, ch. 541, § 41a, 30 Stat. 556 (1898). At that time, pursuant to Bankruptcy Act, ch. 541, § 30, 30 Stat. 556 (1898)(repealed 1964), the Supreme Court was given authority to promulgate rules, forms, and orders to regulate bankruptcy procedure. These rules were enacted that same year, and were called General Orders. 172 U.S. 653-66 (1898). The modern bankruptcy rules were adopted in 1973 and superseded General Orders 1-7, 9-12, 14-26, 28-40, 42-45, 47, 50, 51, 53 and 56. 411 U.S. 989 (1973).

[83] *See* General Orders, 172 U.S. 653-66 (1898).

[84] It has been suggested, moreover, that section 41a of the Act was unnecessary to confer the contempt powers on the bankruptcy court since "[a]ny act, matter, or thing which any

It is submitted that the *Fidelity* court's resolution of the issues before it was eminently reasonable. Since the rule 11-44 stay was designed to replace the pro forma staying order utilized prior to its adoption, the majority's holding, with respect to rule 11-44, appears consonant with the intent of its draftsmen.[85] A contrary holding would mandate that each bankruptcy court expressly order compliance with those rules it deems appropriate in the proceedings before it. Uniformity of procedure and administrative efficiency would thus be gravely endangered without any corresponding benefit.

Since the purpose of Chapter XI proceedings is the rehabilitation of the debtor,[86] it is obvious that all the debtor's assets which may be essential to its arrangement must be protected from interference during the pendency of proceedings before the bankruptcy court.[87] When such assets clearly have value to the debtor, the courts have defined property liberally,[88] so that these interests may be included in the arrangement, or at least subject to the bankruptcy court's jurisdiction. No convincing reason appears to exist for reversing this trend when strangers to the Chapter XI proceedings seek to assert interests that conflict with those of the debtor. Through the exercise of its exclusive jurisdiction, the bankruptcy court will be put on notice of conflicting claims, and can control the timing of actions brought to adjudicate the underlying substantive issues.[89] As the *Fidelity* majority indicates, suits in willful contravention of the rules protecting the bankruptcy courts' jurisdiction will not be countenanced.

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United States court may punish as a contempt may be punished as such by a court of bankruptcy . . . ." Boyd v. Glucklich, 116 F. 131, 135 (8th Cir. 1902); *cf.* 9 H. REMINGTON, BANKRUPTCY § 3535 (1955 & Supp. 1976)(no formal order need be issued by the bankruptcy court to punish as contempt interference with the court's exclusive jurisdiction when the contemnor had knowledge of the bankruptcy petition). The *Boyd* court believed that section 41a was intended merely to indicate that the referee could not himself impose sanctions for contempt, but could only certify the issue to the district court judge. 116 F. at 135. *See also* 2A COLLIER, *supra* note 2, § 41.02.

[85] Notes of Advisory Comm. on Bankruptcy Rules, *reprinted in* 11 U.S.C. app., at 512-13 (Supp. V 1975).

[86] *See* note 2 and accompanying text *supra*.

[87] *See* note 47 and accompanying text *supra*.

[88] This liberal construction is exemplified in the cases discussed in note 43 *supra*.

[89] *See* text accompanying note 70 *supra*.